MOTIF ERA SDN BHD A

v.

HOCK KHENG CONSTRUCTION SDN BHD

HIGH COURT MALAYA, PENANG B
CHEW SOO HO JC
[CIVIL APPEAL NO: 12B-183-2010]
24 FEBRUARY 2011

CIVIL PROCEDURE: *Stay of execution - Winding-up proceedings - Whether hearing of winding-up petition be stayed pending appeal - Appeal not to operate as a stay - Whether special circumstances shown by company* C

COMPANY LAW: *Winding-up - Stay of execution - Application for stay of winding-up proceeding pending appeal - Appeal not to operate as a stay - Whether special circumstances shown by company - Whether appeal rendered nugatory* D

This was an application filed by the applicant/appellant for a stay of all proceedings of execution or enforcement of the judgment handed down by the Sessions Court, pending appeal. The applicant was a housing developer and development was on-going. The applicant claimed that the petition for winding up by the respondent would affect the whole business operation of the appellant. There had been negotiations for settlement but the respondent filed the said petition when no settlement was achieved. The applicant contended that this showed *mala fide*. The applicant also claimed that it was able to pay the judgment sum and contended that the respondent would not be able to repay (in the event the appeal was successful) if the judgment sum was paid to them. E F

Held (dismissing application with costs):

(1) For an application for a stay of execution, the onus is on the applicant to demonstrate the existence of special circumstances. An appeal itself shall not operate as a stay of execution unless the court so orders and the paramount consideration governing an application for such a stay is that the appeal, if successful, should not be rendered nugatory; *Kosma Palm Oil Mill Sdn Bhd & Ors v. Koperasi Serbausaha Makmur Bhd* (refd). (para 12) G H

(2) Special circumstances need not be 'very' special or very exceptional circumstances but must nevertheless be exceptional in character and unusual or uncommon as distinct from ordinary circumstances. 'Special circumstances' should not be accorded with any other liberal interpretation for otherwise, its meaning and purpose would be defeated; *Leong Poh Shee v. Ng Kat Chong* (foll). (para 15) I

(3) The applicant's claims that the execution proceedings would harm the construction business of the applicant wherein their bank accounts would be frozen, that they would be deprived from doing their business and that their workers would be deprived of their source of income were all common consequences as a result of a successful winding-up petition. These were not special circumstances. The existence of a counterclaim also cannot be construed as special circumstances for the purposes of an application for stay of execution; *Eddie Lee Kim Tak & Yang Lain lwn. Jurutera Consultant (SEA) Sdn Bhd & Yang Lain* (foll). (para 16)

(4) The contention of the fear of losing the business, the bank account being frozen and the workers running the risk of being out of job on account of the respondent's execution of the judgment, does not render the appeal if successful, nugatory. (para 19)

(5) The applicant failed to prove their allegation that the respondent would not be able to repay the judgment sum if the applicant were to succeed in their appeal ultimately. (para 19)

(6) The respondent's claim and judgment obtained was a purely monetary claim. It is a clear principle that the court will not deprive a successful party of the fruits of his litigation until an appeal is determined; *Serangoon Garden Estate Ltd v. Ang Keng* (refd); *Ming Ann Holdings Sdn Bhd v. Danaharta Urus Sdn Bhd* (refd). (para 6)

(7) Although there might have been some negotiations between the parties to settle the case, execution is nevertheless a natural process after obtaining a judgment and the respondent cannot be faulted as *mala fide* when they choose to exercise their right to proceed to execution, perhaps when no consensus could be reached for an amicable settlement. (para 7)

Case(s) referred to:

Eddie Lee Kim Tak & Yang Lain lwn. Jurutera Konsultant (SEA) Sdn Bhd & Yang Lain [2007] 10 CLJ 166 HC ***(foll)***

Harpers Trading (M) Sdn Bhd v. Davids Distribution Sdn Bhd [1999] 1 LNS 171 HC ***(foll)***

Jaya Harta Realty Sdn Bhd v. Koperasi Kemajuan Pekerja-Pekerja Ladang Bhd; Tetuan Isharidah, Ho, Chong & Menon (Garnishee) [2000] 3 CLJ 361 HC ***(refd)***

Kosma Palm Oil Mill Sdn Bhd & Ors v. Koperasi Serbausaha Makmur Bhd [2003] 4 CLJ 1 FC ***(refd)***

Leong Poh Shee v. Ng Kat Chong [1965] 1 LNS 90 HC ***(foll)***

Ming Ann Holdings Sdn Bhd v. Danaharta Urus Sdn Bhd [2002] 3 CLJ 380 CA ***(refd)***

See Teow Guan & Ors v. Kian Joo Holdings Sdn Bhd & Ors [1997] 2 CLJ 299 CA ***(refd)***

Shing Hup Hin Construction Sdn Bhd v. General Soil Engineering Sdn Bhd [1999] 1 CLJ 303 HC ***(foll)***
Serangoon Garden Estate Ltd v. Ang Keng [1953] 1 LNS 98 HC ***(refd)***
Sri Binaraya Sdn Bhd v. Golden Approach Sdn Bhd (No 2) [2003] 5 CLJ 268 HC ***(refd)***
Quantum Far East (M) Sdn Bhd v. Kayla Beverly Hills (Malaysia) Sdn Bhd [2002] 1 LNS 24 HC ***(refd)***

Legislation referred to:
Companies Act 1965, ss. 221, 222
Housing Development (Control and Licensing) Act 1966, s. 7A(5)
Rules of the High Court 1980, O. 55 r. 12

For the appellants - Gurubachan Singh Johal; M/s Nashir Johal & Co
For the respondent - Kheng Leong Ong; M/s Ghazi & Lim

Reported by Amutha Suppayah

JUDGMENT

Chew Soo Ho JC:

[1] This is an application filed by the applicant/appellant for a stay of all proceedings of execution or enforcement of the judgment dated 17 March 2010 handed down by the Sessions Court at Georgetown pending this appeal and/or any appeal to the Court of Appeal. The respondent is objecting to this application.

Applicant's Submission

[2] In brief, learned counsel for the applicant submitted that this appeal is just a few weeks away in March 2011 and respondent should not have objected. Applicant is a housing developer and development is on-going. The petition for winding-up by the respondent would affect the whole business operation of the appellant. There has been negotiations for settlement but the respondent filed the said petition on the following day after the date of that negotiation when no settlement was achieved which applicant contended to be *mala fide*.

[3] On special circumstances, learned counsel cited *Jaya Harta Realty Sdn Bhd v. Koperasi Kemajuan Pekerja-Pekerja Ladang Bhd; Tetuan Isharidah, Ho, Chong & Menon (Garnishee)* [2000] 3 CLJ 361 on the meaning of 'special circumstances', the Federal Court case of *Kosma Palm Oil Mill Sdn Bhd & Ors v. Koperasi Serbausaha Makmur Bhd* [2003] 4 CLJ 1 and *Sri Binaraya Sdn Bhd v. Golden Approach Sdn Bhd* (No 2) [2003] 5 CLJ 268.

[4] The applicant, it is submitted, is able to pay the judgment sum and is prepared to deposit half of the judgment sum into court as applicant is contending that the other half had been paid. The applicant contended that respondent would not be able to repay if the judgment sum is paid to them because respondent has not rebutted *vide* affidavit on the allegation that respondent is unable to repay the said judgment sum. There was no current financial status showing the ability of the respondent to repay as the SSM search (exh. "KM9") only indicates the revenue of the respondent in the sum of RM28,753,339 with profit after tax in the sum of RM156,743 but this is in respect of financial year ended at 30 June 2008.

[5] If stay is not granted and upon the petition for winding-up, the bank may freeze the accounts of the applicant and the whole operation of the appellant will be taken over by a manager who may not be experienced in housing development. Learned counsel submitted further that the Housing Development (Control And Licensing) Act 1966 (Act 118) has provided *vide* s. 7A(5) that all moneys in the Housing Development Account and all moneys held by the stakeholder shall, notwithstanding any written law to the contrary, be deemed not to form part of the property of the licensed housing developer in the event that the licensed housing developer goes into voluntary or compulsory liquidation. Pursuant to s. 222 of the Companies Act 1965 (Act 125), the court has the power to stay or restrain proceedings against the applicant.

[6] Thus, applicant prays for a stay of the execution pending the disposal of this appeal.

Respondent's Submission And Reply

[7] A written submission has been tendered by learned counsel for the respondent.

[8] In gist, the respondent submitted that this is a case of monetary judgment after a full trial. Merits of the case in a stay application is not a relevant matter for consideration (*Kosma Palm Oil Mill Sdn Bhd (supra)*) and the fact of an existence of a counterclaim is not to be construed as special circumstances citing *Eddie Lee Kim Tak & Yang Lain lwn. Jurutera Konsultant (SEA) Sdn Bhd & Yang Lain* [2007] 10 CLJ 166. What is left to be considered is whether the appeal, if successful, would be rendered nugatory; (*Kosma Palm Oil Mill Sdn Bhd (supra)*). Learned counsel submitted the answer must be in negative. The respondent denies that it is a dormant company. From exh. "KM9" at the last page of the SSM search of the respondent, it shows that the asset is more than the liability and the respondent is capable of repaying the judgment sum should the appellant succeed ultimately in its appeal. On the various

fear of the applicant of losing business etc., learned counsel for the respondent referred our Court of Appeal's case of *Ming Ann Holdings Sdn Bhd v. Danaharta Urus Sdn Bhd* [2002] 3 CLJ 380 CA; which held that all these are not 'special circumstances' nor do they show that the appeal if successful, will be rendered nugatory. Referring to *See Teow Guan & Ors v. Kian Joo Holdings Sdn Bhd & Ors* [1997] 2 CLJ 299 CA; learned counsel submitted that as held therein, a winding up petition ought to be prosecuted to a conclusion with all due speed.

[9] In respect of the *Sri Binaraya*'s case as cited by learned counsel for the appellant, learned counsel for the respondent submitted that, that case is distinguishable as the petition for winding-up therein was not based on a judgment of the court.

[10] It was submitted that there was no special circumstances in this case and respondent prays that this application is to be dismissed with costs.

Evaluation and Findings

[11] I have perused both the affidavits filed by the applicant in support of this application (encl. 8) sworn on 17 February 2011 and by the respondent objecting to this application sworn on 22 February 2011 respectively and have duly considered the submissions by both learned counsel for the applicant and respondent.

[12] It is trite that for an application for a stay of execution, the onus is on the applicant to demonstrate the existence of special circumstances. An appeal itself shall not operate as a stay of execution unless the court so orders and the paramount consideration governing an application for such a stay is that the appeal, if successful, should not be rendered nugatory; see *Kosma Palm Oil Mill Sdn Bhd (supra)*.

[13] On the meaning of 'special circumstances', learned counsel for the applicant urged this court to adopt the approach in *Jaya Harta Realty Sdn Bhd (supra)* where His Lordship Vincent Ng J (as he then was) had held, *inter alia* that:

> Held:
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> [3] Thus 'special circumstances' does not mean very special or exceptional or peculiar circumstances but is a term to denote a combination of certain determining factors that are demonstrated by affidavit evidence to persuade the court that it is a just and appropriate case to grant a stay of execution in the circumstances.

[14] In *Leong Poh Shee v. Ng Kat Chong* [1965] 1 LNS 90 HC, His Lordship Raja Azlan Shah J (as His Royal Highness then was), on the other hand gave the meaning of the term 'special circumstances' to be:

> Special circumstances, as the phrase implies, must be special under the circumstances as distinguished from ordinary circumstances. It must be something exceptional in character, something that exceeds or excels in some way that which is usual or common.

[15] Special circumstances need not be 'very' special or very exceptional circumstances but must nevertheless be exceptional in character and unusual or uncommon as distinct from ordinary circumstances. I think the definition given by His Lordship Raja Azlan Shah J above is clear enough and 'special circumstances' should not be accorded with any other too liberal interpretation for otherwise, its meaning and purpose would be defeated.

[16] From what has been deposed by the applicant's deponent *vide* the aforesaid affidavit in support, the special circumstances seem to be that the execution proceedings would harm the construction business of the applicant wherein their bank accounts would be frozen and they would be deprived from doing their business; in addition, their workers would be deprived of their source of income. I find all these to be common consequences as a result of a successful winding-up petition. On this point, His Lordship Abdul Hamid Mohamad JCA (later CJ) has proposed a solution to all these fears when he held in *Ming Ann Holdings Sdn Bhd (supra)*, *inter alia*, as follows:

> Held:
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> (10) On the facts, the grounds relied on by the applicant are nothing more than 'fear of losing'; fear of losing business, fear of losing customers, fear of losing suppliers; fear of losing goodwill, fear of not being able to collect its debts from third parties, in case the applicant company is wound up. All that the applicant has to do to avoid such 'fears' is to settle the judgment debt. These factors are not 'special circumstances' nor do they show that the appeal, if successful, will be rendered nugatory. They are nothing unusual. Execution is a natural process after obtaining a judgment.

[17] Therefore I hold that the fears of the applicant's bank account being frozen and that their workers may probably lose their job are not special circumstances as, to reiterate, these would probably be the natural consequences if a company is unable to settle a debt, for example, which leads to a winding up proceeding. The applicant could eliminate this problem by settling the judgment debt.

[18] On the submission that the applicant has a counterclaim in this case, I agree with respondent's submission and the decision in *Eddie Lee Kim Tak*'s case that the existence of a counterclaim cannot be construed as a special circumstances for the purposes of an application for stay of execution.

[19] The issue left to be considered is whether the grounds relied on by the applicant will render the appeal, if successful, nugatory. I am of the view that the contention of the fear of losing the business, the bank account being frozen and the workers running the risk of being out of job on account of the respondent's execution of the judgment, does not render the appeal if successful, nugatory. The only consideration as submitted and contended by the applicant is that the respondent will not be able to repay the applicant the said judgment sum in the event the applicant were to succeed in the appeal giving the reason *vide* its affidavit in support that the respondent is dormant and would have no means or ability to repay such sum. Applicant relied on the SSM search which was exhibited as "KM9". However, the allegation of respondent being a dormant company is not supported by this exh. "KM9" as it is nowhere so stated but conversely, it is contradictory to this search where at p. 1/6 in relation to 'Corporate Information", the status of the respondent company is noted as 'existing' with registered address as well as business address which clearly show that the respondent is still an existing and operating business at the stated business address. At p. 6/6, it also indicates the respondent enjoyed a profit after tax of RM156,743. Learned counsel for the applicant argued that this is the figure as at 30 June 2008 and not current. Ironically, this is the exhibit annexed in the applicant's own affidavit. If they are in doubt of such statement contained in exh. "KM9", it is their duty to obtain the most current search. By relying on exh. "KM9" as their basis to contend that respondent is a dormant company and has no financial ability to repay the judgment sum of RM58,010.78 when KM9 shows otherwise, the applicant has indeed failed to prove their allegation that the respondent would not be able to repay the judgment sum if the applicant were to succeed in their appeal ultimately. Consequently, I find that the applicant has failed to advance any special circumstances nor that the appeal in this court, if successful, will be rendered nugatory in law and upon a finding of fact as deposed in the affidavit filed herein.

[20] The respondent's claim and judgment obtained is a purely monetary claim. "It is clear principle that the court will not deprive a successful party of the fruits of his litigation until an appeal is determined" per Browne J in *Serangoon Garden Estate Ltd v. Ang Keng* [1953] 1 LNS 98 HC; see also *Ming Ann Holdings Sdn Bhd (supra)*. Although there might have been some negotiations between the parties to settle the case, execution is nevertheless a natural process after obtaining a judgment and respondent cannot be faulted as *mala fide* when they chose to exercise their right to proceed to execution, perhaps when no consensus could be reached for an amicable settlement. They must be allowed to pursue to obtain the fruits of their litigation.

[21] This application (encl. 8) is therefore dismissed with costs.

Post- Script

[22] I have after preparing this draft decision, received three authorities from the firm of the learned counsel for the respondent on the issue of s. 222 of the Companies Act 1965 which I find no necessity to deal with in my decision earlier as this application is made pursuant to O. 55 r. 12 of the Rules of the High Court 1980 and not under s. 222 of the Companies Act 1965 pertaining to the power of this court to grant the stay of execution. Having perused the cases submitted ie, *Shing Hup Hin Construction Sdn Bhd v. General Soil Engineering Sdn Bhd* [1999] 1 CLJ 303 HC, *Harpers Trading (M) Sdn Bhd v. Davids Distribution Sdn Bhd* [1999] 1 LNS 171 HC; and *Quantum Far East (M) Sdn Bhd v. Kayla Beverly Hills (Malaysia) Sdn Bhd* [2002] 1 LNS 24 HC, all of which pertain to the interpretation or the meaning of s. 222 of the Companies Act 1965, and having taken an assiduous analysis of the provision of s. 222, I must say that I agree with the well analysed interpretation as laid down by His Lordship Abdul Aziz J (as he then was) in *Shing Hup Hin Construction Sdn Bhd (supra)* when His Lordship held:

> Held, dismissing the application with costs:
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> On the proper analysis of the manner in which s. 222 is constructed, during the pendency of the winding-up petition in question, there is also pending an action or proceeding against the company that is sought to be wound up. The action or proceeding that is also pending must be other than the winding-up petition in question, although it may be some other winding-up petition. What may be applied for and ordered under the section is a stay of further proceedings in the action or proceeding that is also pending, not further proceedings in the winding-up petition in question, which in this case is the present winding-up petition.

[23] In *Harpers Trading (M) Sdn Bhd (supra)*, His Lordship Steve Shim J (later CJ Sabah & Sarawak) has made it amply clear that "because the actual winding-up petition has yet to come up for hearing, ... the court has no power or jurisdiction under ss. 221 or 222 of the Act to entertain the respondent's motion for stay of the winding up petition." I can do no better but to agree with the profound finding of His Lordship above that s. 222 is not applicable when the actual winding-up petition in the instant case has yet to come up for hearing. Even if s. 222 were to be invoked and applied, it only goes to strengthen my decision to dismiss this application above.